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In The

Supreme Court of the United States

October Term, 1957

No. 193

WILLIAM M. LANGLEY,
Petitioner,

vs.

THE STATE OF OREGON

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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Title & Trust Building,
Portland, Oregon.
Petitioner.

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The State in its brief in opposition attempts to raise in this Court a question of state procedure, that the denial of due process was not properly raised by petitioner in the state court. This Court has repeatedly held that to review a decision of a state court it must appear that a federal question was presented to the highest court of the state, and that the judgment as rendered could not have been given without deciding it. This Court frequently grants the petitioner for a writ of certiorari where substantial claims of denial of due process in a criminal proceeding have been rejected by the state

court. *Williams v. Kaiser*, 323 U.S. 471. The trial court and the Oregon Supreme Court considered and rejected the claim of denial of due process (p. 5, 6 petition) thereby determining that it was properly raised. Petitioner during the trial repeatedly complained to the trial judge about the excessive courtroom photography disturbing his mental processes, and at one stage said:

> "* * *, and the permitting of the people in the court to disturb counsel in the presentation of the case and in hearing the evidence is a denial of the defendant's right to a fair trial as guaranteed by the Constitution of the United States, the protection of which the defendant now invokes."

This certainly advised the State that petitioner was being denied the effective assistance of counsel. So frustrated was counsel from his fight over the courtroom photography that he neglected to move for a mistrial when petitioner was arrested for perjury in order to prejudice the jury, a case later dismissed for lack of evidence.

The Oregon Supreme Court admits the excessive court room photography was error, but not reversible error unless it influenced the jury. It ignored "disturbing counsel in the presentation of the case and hearing the evidence" and "affecting his mental processes", apparently overlooking the constitutional requirement of effective assistance

of counsel; and when this was called to the attention of that court in the petition for rehearing it was rejected. The fact is that petitioner's counsel, from the ordeal of fighting with the photographers and complaining to the trial judge about the photography affecting his mental processes, emerged manifestly beaten and crushed, and his attention was so diverted from the defense of the case that he was completely ineffective. It is asserted that petitioner, a lawyer, should have acted. Such a contention has been denied by this Court in *Glasser v. U.S.*, 315 U.S. 60, 70. Furthermore, petitioner, due to the photography and his arrest for perjury for the purpose of prejudicing the jury, was so upset he could not even assist his counsel in his defense, let alone take over the defense when his counsel became crushed and beaten from his fight over the photography.

Due process requires that a defendant on trial in a state court upon a criminal charge shall not be denied or deprived of his fundamental Constitutional right to the effective aid and assistance of counsel. Emphasis is properly placed in the opinions of this Court upon the requirement that the assistance of counsel be effective. It is not enough that a defendant be ostensibly represented by an attorney in his trial. It is necessary that no situation be created or allowed to exist which serves to nullify, or materially to impair, the reality of the representation which appears to have existed. And especially

destructive of counsel is the existence of any situation which may well be considered to destroy or impair his mental processes.

The State's brief in claiming the excessive photography did not prejudice petitioner quotes the Oregon Supreme Court:

> "The circuit judge * * *, manifested his opinion that no prejudice had resulted to the defendant."

But this Court said in *Glasser v. U.S.*, 315 U.S. 60, 76:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The most recent case in which the denial of effective assistance of counsel was considered is the case of *Grandsinger v. Bovey*, 153 F. Supp. 201. In that case the prosecutor for the State of Nebraska in his jury argument stated that counsel for the defendant had attempted during the trial to alter some of the State's evidence. The defendant having been convicted in the State courts and being incarcerated brought habeas corpus in the United States District Court for Nebraska. That court ruled that such act did deny defendant the effective assistance of counsel. *Grandsinger v. Bovey*, 153 F. Supp. 201, affirmed 253 F2d 917 (8th Cir.), certiorari by Nebraska denied June 23, 1958. Your petitioner, not being in custody, cannot obtain habeas corpus, and petitions

this Court as the forum in which he can present his Federal claim of denial of due process in denying him the effective assistance of counsel.

The remaining questions of due process were raised on rehearing which was the first time they could have been raised after they appeared in the case. (Petition p. 6.)

Petitioner has endeavored to present to the Court only questions of law applicable to his constitutional rights which he claims were violated, and he did not expect the State to urge the guilt of petitioner as it has in its brief in opposition to the writ of certiorari. This Court's sole concern is to see that no conviction contrary to a valid objection raised under the fourteenth amendment is upheld. *Musser v. Utah*, 333 U.S. 95, 98. The "Illegal gambling" observed by petitioner was carried on by a charity. The Oregon Supreme Court held it was illegal because the games were conducted by a common gambler, William B. Nettleton, but admitted, as does the State in its brief (p. 2, 9), that the State did not prove that petitioner knew William B. Nettleton. If the gambling was only illegal because a common gambler, William B. Nettleton, was involved, and the State did not prove petitioner knew William B. Nettleton, how could petitioner observe "Illegal gambling". This defect was solved by the Oregon Supreme Court by adding a charge to the indictment under a different statute, that petitioner should

have investigated and found William B. Nettleton. Petitioner's point is that he was not charged with failure to investigate gambling, but with failure to prosecute William B. Nettleton, who the Oregon Supreme Court admits the State did not prove petitioner knew. This Court has held in *DeJonge v. Oregon*, 299 U.S. 353, 362, that to convict on a charge not made is a denial of due process. As stated in the petition (p. 10) if petitioner had been advised on the trial that he was charged with failure to investigate gambling he could have proved investigations which revealed a charity party; and did not reveal William B. Nettleton, who was not discovered until two years after the party.

Justice Murphy said in *Glasser v. U.S.*, 315 U.S. 60, 67:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances, would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. LANGLEY,

Petitioner.

August, 1958.